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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 941

UNITED STATES OF AMERICA *ex rel.* WINFRED
WILLIAM LYNN,

Petitioner,

—against—

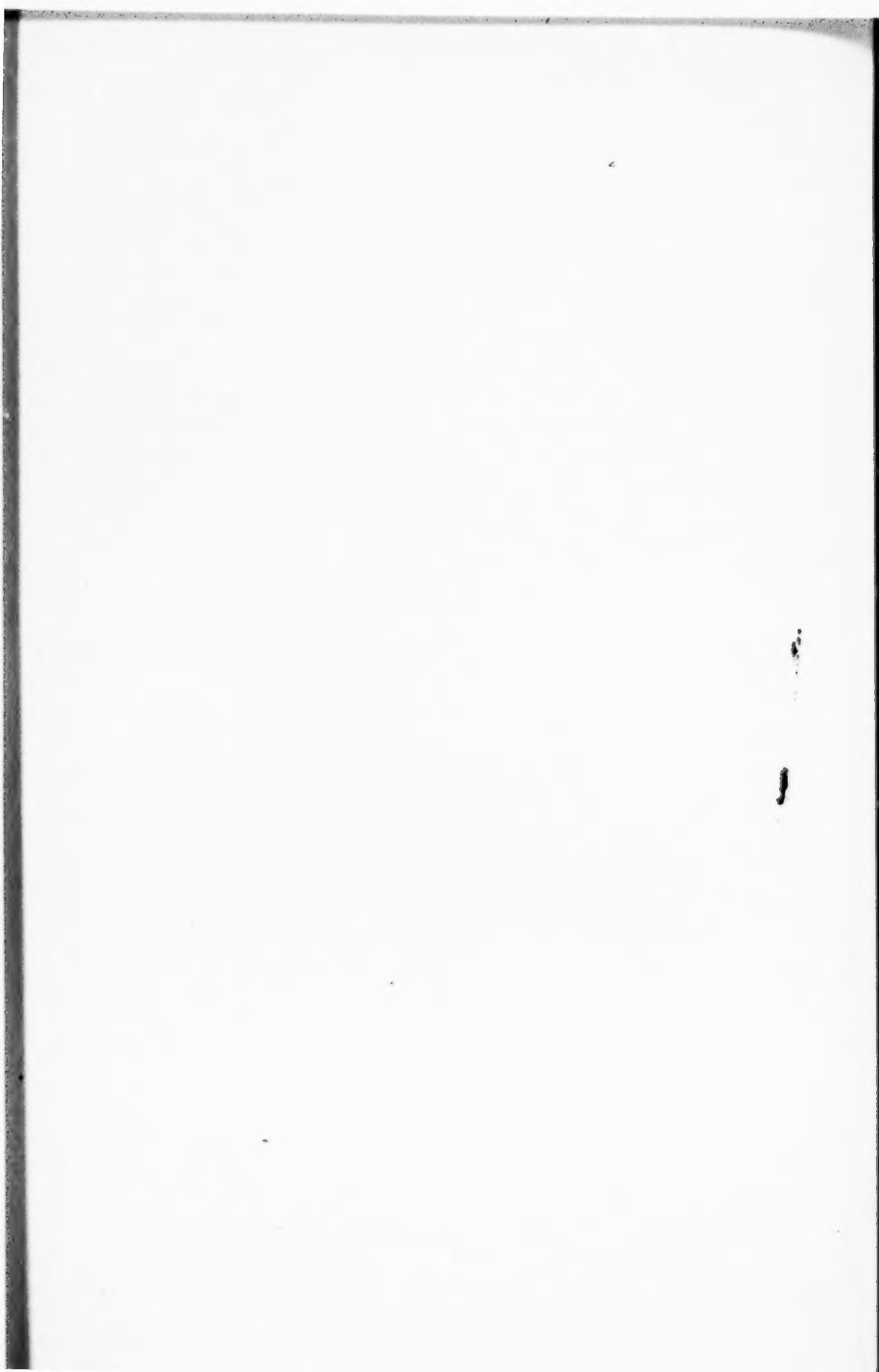
COLONEL JOHN W. DOWNER, Commanding Officer
at Camp Upton, New York,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT AND BRIEF IN SUPPORT
THEREOF**

ARTHUR GARFIELD HAYS,
GERALD WEATHERLY,
Counsel for Petitioner.

CONRAD J. LYNN,
ALBERT C. GILBERT,
On the Brief.



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To the Honorable the Supreme Court of the United States:

Your petitioner, Winfred William Lynn, respectfully represents and petitions as follows:

Summary Statement of the Matter Involved.

Petitioner seeks review of the judgment of the United States Circuit Court of Appeals for the Second Circuit (Swan and Augustus Hand, *JJ.*; Clark, *J.*, dissenting), affirming on February 21, 1944, the order of the United States District Court for the Eastern District of New York (Marcus B. Campbell, *J.*) dismissing, after a hearing, his petition for a writ of habeas corpus. He contends he was unlawfully inducted into the United States Army because

he was selected and inducted under a "Negro quota," in violation of the "no discrimination" provision of the Selective Training and Service Act of 1940 (50 U. S. C. A. App. Sec. 304 [a]). The opinions in the Circuit Court of Appeals appear in the Record at pages 63-74, folios 64-77, and are reported in 140 F. 2d 397.

The Statutes and Regulations.

The portion of the statute involved in this application (50 U. S. C. A. App. Sec. 304 [a]), reads as follows:

" * * * In the selection and training of men under this Act, and in the interpretation and execution of the provisions of this Act, there shall be no discrimination against any person on account of race or color."

Selective Service Regulations (2d ed.) Sec. 623.1, read, so far as material, as follows:

"(c) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice."

The Facts.

Relator-appellant is an American citizen and a Negro (R. 23, fol. 68). He duly registered under the Selective Service Act of 1940. He received an order to report for induction on September 18, 1942 (Relator Exhibit 3; R. 58, fol. 172; R. 23-24, fols. 68-71). That order was made pursuant to the requisition for induction of August 7, 1942, which appears as Relator Exhibit 1 (R. 55, fol. 163. Cf. R. 45, fol. 134; R. 22-23, fols. 66-67; R. 55, fol. 164; R. 58, fol. 174; R. 24, fols. 70-71). That requisition called on

Local Board No. 261, setting forth its quota "for this call" as "the first 90 white men and the first 50 Negro men who are in Class 1-A."

The method which led to Lynn's induction is clear from the testimony of Col. Arthur V. McDermott, New York City Director of Selective Service, who said (R. 13-14, fols. 39-40) :

"We receive a requisition from the government for so many white men and so many colored men for induction each month and then we break that list down among the local boards and that is on a proportionary basis and each local board will be called upon to produce so many whites and so many Negroes for induction."

Col. McDermott further testified that men ordinarily were taken in their turns, but that there was an exception in case of Negroes and whites (R. 15, fols. 43-44). There was "a Negro quota and a white quota" (R. 16; fol. 46). There was also "a separate delivery list" (R. 14; fol. 41).

The facts are clear from the categorical testimony of Col. McDermott (R. 16, fol. 46) :

" * * * you do have a Negro quota and a white quota?
A. Oh, yes."

Also at R. 17, folio 51 :

"Colonel, am I not right in my statement that Negroes and white men are not called in turn or serially, but that the question of color has something to do with the time they are called? A. That's right."

The issue was clearly stated by the trial court (R. 32; fol. 96) :

"The petition raises the issue fairly enough, whether or not he was sent under a Negro quota, and if he

was they contend that is not in accordance with the law and the Constitution."

The Opinions Below.

The majority of the Circuit Court of Appeals, Mr. Justice Swan and Mr. Justice Augustus Hand, held "that requisitions calling for a specified number of whites and a specified number of Negroes for induction during a given month and based on relative racial proportions of the men registered with a local board and subject to call for induction, is a necessary and permissible administrative procedure, and the regulations which sanction it are not violative of the Act" (R. 68; fol. 69).

Mr. Justice Clark, dissenting, held that the language and history of the Statute forbade this procedure, adding (R. 72; fol. 74) :

" * * * In fact, I find it difficult to think of more apt language to express the Congressional intent; the suggestion that Congress should have said something more, or amended the statute, means in effect that it should be watchful to see how a statute is violated and then expressly negative such violation or be assumed to sanction it."

In answer to the alleged practical difficulties which it is said might arise if petitioner's position were upheld, Judge Clark said (R. 74; fol. 76) :

" * * * This registrant asserts his desire to serve and his willingness to do so if inducted according to law. I think it unsound to overlook a violation of law as to him on a premise which we ourselves would reject as patriotic citizens and which is contrary to the whole spirit of the Act, namely, that avoidance of service is

to be desired. But notwithstanding the fears expressed by the United States Attorney, this cannot mean the release from the Army of large numbers of soldiers; alike with volunteers, those who have gone into service properly without immediately raising any objections they have, and relying upon them as steadfastly as did this registrant here, surely have no ground to approach the court."

Jurisdiction.

The Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, §1 (43 Stat. 938), 28 U. S. C. A. §347 (a). The judgment of the Circuit Court of Appeals was entered February 21, 1944 (R. 75).

Question Presented.

1. Whether, consistently with the "no discrimination" provision of the statute, Negro American citizens can be selected and inducted, not strictly in their turn according to their order numbers as determined by the impartial National draft lottery, but under separate "Negro quotas" based on the percentage of negroes in the population of the local board area.

Reasons Relied on for the Allowance of the Writ.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

It has decided:

(a) That it is not "discrimination against" petitioner, a patriotic American citizen, to call him for induction later

than his turn according to the impartial national draft lottery;

(b) That it is not "discrimination against" petitioner to call him, not strictly in his turn according to his order number as determined by the impartial national lottery, but pursuant to a separate "Negro quota" based on the percentage of Negroes in the population of the local board area.

Petitioner and the dissenting Justice of the Court below, Mr. Justice Clark, view the practice of the Draft Authorities, thus upheld, as a direct violation of the expressed will and policy of Congress. Where a statute says there shall be "no discrimination" in the selection of men, can the civilian authorities through draft boards handle the selection of men in such a way that the color of a man plays a significant part in his induction? American citizens are entitled to be called to serve in their turn as American citizens and this applies to all—Jew, Protestant, or Catholic, white, red or black. Petitioner considers the present method of selection a tragic blow to the freedom and solidarity of the nation, affecting in its consequences not only the liberties, sensibilities, and self-respect of the 13,000,000 Negroes of the country, but also the liberties of all others. Selection of men is a civilian not a military function. If the unequivocal direction of Congress can be flouted by ministerial officers, civil or military, the liberties of all of us—and particularly the rights of the millions of young men, white and black, now being drafted—are endangered.

WHEREFORE petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for review and determination, as provided by

law, this cause and a complete transcript of the record and of all proceedings had herein; that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed; and that petitioner may have such other and further relief in the premises as this Court may deem proper.

Dated April 27 , 1944.

ARTHUR GARFIELD HAYS,
GERALD WEATHERLY,
Counsel for Petitioner.

I HEREBY CERTIFY that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.